Law Reform Commission of Canada
Commission de réforme du droit du Canada

maintenance on divorce

Working Paper 12

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1975

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This *Working Paper* presents the views of the Commission at this time. The Commission's final views will be presented later in its Report to the Minister of Justice and Parliament, when the Commission has taken into account comments received in the meantime from the public.

The Commission would be grateful, therefore, if all comments could be sent in writing within three months to:

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Table of Contents

Introduction

In our working paper on family property we emphasized the need for some equitable mode of property sharing in marriage. But this is only one aspect of a broader programme of legal reform that should be undertaken on behalf of the Canadian family. In this working paper we deal with another fundamental matter: interspousal maintenance obligations. Alteration of the rules of maintenance between spouses both in form and in concept is an important part of any meaningful improvement in the legal fabric of matrimony, and essential in providing a rational foundation for other reforms to family law.

In its classical or historical form, the maintenance obligation arising upon marriage is that a husband has a legal duty to provide his wife with the necessaries of life: food, shelter and clothing. This was buttressed by the doctrine that a wife could pledge her husband's credit for personal and household items in maintaining the style of living determined by the husband, but this power was lost to the wife if he forbade her to do so or if she committed adultery or deserted him. On the other hand, once married a woman had no corresponding duty towards her husband or further need to participate in the economy to support herself. The civil law tradition has been one of theoretical reciprocity but this was still subject to provisions of the Civil Code placing the primary financial responsibility on the husband.

Raising children and being a homemaker is a legitimate choice and an extremely valuable contribution to the strength of the family

unit as well as to the stability of society. Reform of the concept of maintenance obligations must neither deny this choice to any person because of a redistribution of financial obligations between spouses nor require that employment outside the home be sought by married persons who would rather assume these roles. By the same token, we believe that it is unsound for the legal order to continue to give any support to the ideas that the primary way for women to participate in the economic benefits of society is through marriage and that men should organize their lives on the assumption that their role in the family is circumscribed by the legal requirement that they must be the primary source of financial provision.

The federal divorce law has moved away from this tradition although, as we shall point out in this working paper, the interspousal maintenance principles in the *Divorce Act* are still inadequate. The provincial rules dealing with maintenance obligations between spouses have, for the most part, not yet been freed from express sexual stereotyping.

The legal tradition of interspousal maintenance, which we discuss at some length in Chapter One, is a product of the cultural and economic realities of the past. Many of the social norms and practices that are found in our history are now seen as inappropriate and sometimes even intolerable from a contemporary perspective. It is self-evident that as new values become dominant and new interests press for recognition, the laws that created arrangements suited to prior conditions become unresponsive to present needs.

The concept of legal dependency determined by sex is something that served a perfectly legitimate function for centuries. Women, for the most part, did not and could not participate in a wide range of activities outside the home, and the law responded by making them legal dependents of their husbands. Such a philosophy of classification by sex, however, is a rational social policy only for so long as the successful manipulation of events and things outside the home depends upon real and observable sex-based distinctions such as strength; or freedom from unwanted pregnancy; or upon the possession of full legal capacity and appropriate educational opportunities, both of which were historically denied to

women (and to some extent still are); and, most important, upon a core of settled belief that certain functions of which either sex is capable ought, for whatever reason, to be carried out by men, while others ought to be done by women.

The impact of the twentieth century experience upon the rational foundation of the concept of female dependency has been profound. Legally-enforceable rights to financial provision, however, are still an essential part of any marriage in which there is a division of function between child-rearing and wage-earning. What is no longer essential is either a need for these functions to be divided along sexual lines, or the conviction that they should be. Men can give full-time affection and care to children no less than women, and should have equal opportunities to choose to do so. Machines, reliable family planning methods and increasing access to education have obliterated real obstacles to female participation in the full spectrum of activities outside the home. Sexual prejudice, while still a potent factor in many areas, is more and more coming to be regarded as the problem of those whose outlook is limited by it rather than as an insurmountable obstacle to those against whom it is directed. Freedom of choice in life roles for both sexes is an ascendant value, with a consequent decline in the acceptance of the idea that "biology is destiny".

We believe these circumstances call for appropriate reforms in the legal structure of the marital relationship. Failure to adjust the law to accommodate the legitimate needs and interests of contemporary society has a serious and weakening effect upon the legal foundation of the family. In this working paper we have made specific suggestions for change in federal law, and have made many observations that are of primary significance with respect to provincial law. From the perspective of strict legal analysis, there are significant differences between maintenance concepts that apply during marriage, which are provincial matters, and maintenance concepts on divorce, which are governed by federal law. From a social or historical perspective, however, the legal traditions involved have a common origin in the customs and economic realities of the past. As has been pointed out by legal scholars, the law is "a seamless web". It is therefore necessary to distinguish between maintenance during marriage and maintenance on divorce

for some purposes without losing sight of the fact that there is also a philosophical unity behind the economic consequences of matrimony that are created by law on the day of marriage and which continue to exist in law after divorce.

As in our other publications in this area, our purpose is to examine the ways in which the law can move in order to strengthen the family unit. We believe that the consideration of ideas and alternatives would be distorted if the very significant features of family law that are within provincial jurisdiction were to be ignored.

This working paper is intended to raise issues for public discussion and response. The views of all persons interested in these matters are invited and will be fully considered by the Law Reform Commission of Canada before a final report is made to the Minister of Justice and to Parliament.

CHAPTER 1

The Historical Foundations of the Present Law

Most persons in Canada are familiar with and indeed, some still accept as self-evident the idea that husbands have a duty to support wives. This is a tradition from a past that was radically different from the present and must be re-examined accordingly.

At one time it was thought that this family financial arrangement, duly confirmed by law, was prescribed by some immutable natural ordering of society. It was presupposed that the social and biological destiny of men was to assume positions of responsibility and leadership in government, the professions and the economy. Women, on the other hand, were thought to have an "essential nature" that suited them to the roles of child care and housekeeping, to require special protection not necessary to the more self-reliant male, and to gain the greatest satisfaction through assuming the identity and status of their husbands. Men were the providers and women were the dependent domestics.

These attitudes and beliefs cannot be stated without appearing to be overstated. In our view, most Canadians would be quick to repudiate any suggestion that they personally believed that men are intrinsically better professionals, legislators or salaried workers, and so on, than women, or that a woman with the interest and potential to become, say, a biochemist or school principal should instead be steered by society into housework because this is more in accord with her "nature". Equally, many people question the validity and desirability of arrangements that leave a father no other choice than to be separated from his children for substantial

amounts of time during their formative years because of financial expectations placed on men as a class. Yet the Royal Commission on the Status of Women in Canada reported that this sort of unthinking sexual stereotyping is characteristic of our society and is given positive reinforcement by law. Contemporary legal arrangements should no longer depend for validity on such *a priori* justification. This method of reasoning serves only to insulate the fundamental basis of family law from critical examination.

In the history of the law of the family, the unilateral maintenance obligation has been the axiom, unquestioned until recent times, upon which rested the entire structure of the legal relationship between married men and women. We believe that a reformed legal concept of marriage as a partnership between equals cannot be built successfully on a foundation that relies for its validity upon the primitive view inherent in the male dominancy – female dependency philosophy of the maintenance rule.

That philosophy can best be illustrated by an examination of the basis for the rule. In 1935, long before this ceased to be a dispassionate issue, one legal scholar put it in these harsh and uncompromising terms:

> [The traditional obligation of support] . . . was the economic relationship between master and slave, and it is the economic relationship between a person and his domesticated animal. In the English common law the wife was, in economic relationship to the husband, his property . . . The financial plan of marriage was founded upon the economic relationship of owner and property.

Although these views are not considered valid today, they still influence the philosophy of our family law. The language of husband as "owner" and wife as "property" is, of course, not present in modern judgments—only the tradition of this arrangement is, because this tradition is the matrix that shaped the present law. And tradition, in the words of Oliver Wendell Holmes, "overrides rational policy".

Another reason for the existence of the maintenance rule is found in the requirements of feudal society. A married woman could play no meaningful part in the affairs that were of consequence in the economic, ecclesiastic, governmental or military

organization of feudalism. She and her husband were viewed in law as "one person", with the husband having the exclusive right to manage not only his own affairs, but hers as well. Requiring him to maintain her was conceptually no different from expecting him to maintain himself. No other view was even capable of being logically thought about, because no other view was consistent with the concept of a feudal society.

This doctrine of "unity of legal personality" still remains as an intrinsic part of the maintenance obligation and therefore, as a part of much of the rest of modern family law, nothwithstanding the existence of statutes that are inconsistent with this feudalistic notion. As one of the world's leading family law scholars wrote in 1971, legislative reform to date has accomplished:

> . . . nothing more than creating extensive exceptions to the old rules without striking at the root of the trouble by abolishing outright the fundamental principle [i.e., the doctrine of "unity of legal personality"] . . . Time and again the courts have reiterated that these Acts have not given a wife the legal status of [an unmarried person] except in certain clearly defined and limited fields, and even these exceptions have been construed, if not narrowly, at least inconsistently.

Many contemporary legal and social views about relationships between husbands and wives—with profound effects upon individual alternatives and life-roles—are to a great extent still influenced by the dead hand of feudalism. Marriage is one of the few remaining institutions of Canadian society where significant rights and obligations are dictated by the law according to a preconceived notion of status (that is, what is appropriate for the status of "husband" or the status of "wife") in the same way that feudal society once imposed obligations and conferred rights on everyone depending on whether they had the status of "serf", "tenant", "lord" and so on.

It is a well-known aphorism in law that the progress of society has been measured by the movement from "status to contract". That is, a mature legal system allows an individual to arrange his legal rights and obligations in a way that is agreeable to his own needs and interests rather than granting or withholding opportunities in accordance with received, and therefore authoritative, legal conceptions of what is appropriate to his status. It has

come to be appreciated that a major object of the law should be to recognize and secure the autonomy and freedom of choice of every person rather than impeding the growth of individuals and institutions by freezing the social order within a rigid framework of status relationships. Married people, however, have been generally excluded from the benefits of this evolution—they still bear the weight of legally-dictated status that is largely determined according to feudal conceptions of what it means to be a husband or a wife.

A third significant reason for the existence of the maintenance rule lies in the fact that at common law a husband gained ownership or control of all his wife's property on marriage—including the right to her income. Significant rights to manage and control his wife's income were also granted to the husband under the civil law. Having no legal capacity to hold property or to keep her earnings, a married woman could not maintain herself. Under these circumstances it was natural for the law to require that a husband was under a legal obligation to maintain his wife.

The rules giving a husband these rights over his wife's property and income have been significantly altered in Quebec over the past four decades. The *Married Women's Property Acts* of the late nineteenth and early twentieth centuries abolished the husband's rights of ownership and control in the common law provinces. But the maintenance rule was not changed. In general terms this was because Victorian society was neither socially nor economically prepared to accept the emancipated income-earning wife, and these reforms were essentially the product of a philosophy that matured during the Victorian era. A specific reason is found in the influence upon the law of that segment of society whose interests were most adversely affected by the old law and served by the new—the propertied classes—who regarded the sort of salaried employment available to women at that time as fit only for servants and menials. The social standing of a husband and the respectability of his wife within this legally-dominant group would have been jeopardized if the wife took a job. In addition, few Victorians were able to conceive of the value of a career outside the home for a wife, either as a means for her personal fulfillment and growth or as a way of enabling her to make the sort of contri-

bution to society her husband did. If anything, a wife with the personal autonomy that accompanies freedom from financial dependence on her husband was thought of as a threat to the stability of the model Victorian family in which rigid and well-defined roles for husbands and wives insulated the spouses against the winds of change that were beginning to blow through society in other quarters. The preservation of these class interests was a dominant value in the family law bequeathed to the twentieth century by the Victorian age.

It would be erroneous to attribute solely to law the various attitudes and beliefs about men and women that have characterized the history of the marriage economic relationship. More than anything else, the law has served that office of rationalizing the existing social order rather than being the articulate voice of what social consequences the legal system should seek to produce, and why those consequences should be preferred. Although the formal legal justification for clinging to a philosophy of the economic dependency of one sex upon the other has shifted with the evolution of society, the fact of this dependency has, until very recent times, remained constant.

The unifying theme that underlies that law's interspousal maintenance tradition, from feudalism to the modern industrial community, is the historical reality of male political and economic domination of society and its institutions. In a recent book, *Economics and the Public Purpose,* John Kenneth Galbraith furnishes an economist's explanation of the contemporary relationship between this reality and orthodox legal assumptions as to which sex should be employed and which should be supported. He states the obvious fact of the "present monopoly of the better jobs in the technostructure by males." What is needed, according to Galbraith's thesis, are modifications in legal concepts governing interspousal financial arrangements, along with concerted efforts to end sexual discrimination in the job market, so that the law of marriage and the economy combine to conduce to a full spectrum of meaningful choice for both sexes, whether married or single:

> A tolerant society should not think ill of a woman who finds contentment in sexual intercourse, child-bearing, child-rearing, physical adornment and administration of consumption. But it

> should certainly think ill of a society that offers no alternative—and which ascribes virtue to what is really the convenience of the producers of goods.

In a current series of national publicity releases relating to International Women's Year, the federal Minister responsible for the Status of Women asks why it should be that:

> Too many of us let our children grow up believing that girls don't really have much choice. That medicine, law, politics, industry are pretty much closed shops to women. That all the important decisions are made by men. That women don't have leadership qualities.

We believe the answer to this question is the historical legacy of female dependency, erected by society and maintained by law for the reasons set out in this chapter. What appears to be a shield and a privilege is in reality a barrier and a yoke. The legal tradition that views persons as dependents because of their sex rather than because of the needs, means and abilities of both spouses, and the division of function in the marriage, has no place in a society that includes the elimination of invidious discrimination based on sex among its goals.

Our conclusion is that neither history nor tradition nor appeals to nature furnish any valid reason for retaining in our law any traces of the view that one sex, as a class, should be generally exempt from the financial responsibilities flowing from marriage that are equivalent in some meaningful way to those borne by the other. We believe that the further retention of any aspect of this tradition in our law will constitute an unnecessary obstacle to the achievement of equal socioeconomic opportunity for both sexes in Canada.

CHAPTER 2

The Present Picture

Legislative jurisdiction regarding the maintenance of spouses is divided between the federal Parliament and the provincial legislatures. Provincial law currently defines the nature of the obligation from marriage to divorce. Maintenance following a divorce is governed by federal law—the *Divorce Act*.

At one time the various Canadian laws dealing with the maintenance of spouses were essentially identical and reflected the traditions discussed in the last chapter: married men were assumed to be the primary source of financial support for their wives and married women were assumed to be dependents. These assumptions formed, and still form, the philosophical basis for most of the provincial laws dealing with legal relationships between husbands and wives that confer benefits, impose liabilities, and apply differing behavioural standards according to the sex of the married person. The traditional legal theory of marriage was that a husband assumed the obligation to provide his wife with the necessaries of life and obtained exclusive rights to her services, affection and sexuality—things that the law deals with under the abstract term "*consortium*." Although the civil law creates a form of reciprocity in the area, the traditional common law theory of marriage gave a wife no meaningful right to these things from her husband, and imposed no obligation on her to maintain him.

This philosophical unity is breaking apart in Canada. Several provinces have abandoned the concept of unilateral maintenance in favour of a law that either requires a wife to support her husband in case he is destitute or physically incapacitated, or that simply

makes each spouse liable to provide reasonable support and maintenance for the other without distinction. Approaches along these lines have been undertaken in Alberta, British Columbia and Quebec.

The policy of the 1968 federal *Divorce Act* is that either a husband or a wife may be ordered to maintain the other after a divorce. The reason for this is quite clear: the old law of maintenance was simply no longer capable of justification on rational grounds. While this must be recognized as a major step forward, its effectiveness has been limited by the fact that the great bulk of family law, including maintenance obligations during marriage, and all that follows from the traditional assumptions upon which those obligations are based, lies within provincial legislative jurisdiction. Changes in the divorce law can open the door to the elimination of sexually-based discrimination in family law generally, but they cannot do it alone.

Canadian family law therefore suffers from the anomaly of a federal divorce concept of maintenance based on a legislative premise of sexual equality, while the maintenance laws of most provinces presuppose a condition of dependency for married women. In terms of maintenance, the *Divorce Act* views marriage as something that, for the majority of persons coming under that Act, it manifestly is not: a relationship between legal equals. Furthermore, the principle of equality in the *Divorce Act* is at variance with the concepts reflected in that body of provincial and territorial laws apart from the maintenance laws, that collectively define the legal meaning of "marriage." This is true to some extent even in jurisdictions that have abandoned the old unilateral maintenance rule—dependency based on sex is gone, but the other laws, regulations, canons of interpretation and legal traditions that employ dependency as their rationale remain largely intact. Some areas of federal law are also not yet free from this carryover from the past.

Another difficulty, both with the *Divorce Act* and the provincial laws that employ a bilateral maintenance obligation, is that there is nowhere a clear legislative statement of the principles under which one spouse should be required to maintain the other. The old rule, while legally discriminatory and socially and economi-

cally harmful, at least had the virtue of being clear: men support women. The new concept, whereby either spouse has or may have a duty to maintain the other, has not been accompanied by a legislative statement of the governing principles to be considered in determining the nature and extent of the financial obligation if any, owed by one spouse to the other. As a result, to the detriment of the effectiveness of the recent reforms, much of the old jurisprudence has continued to hold undue sway over the new. It is implicit in legislation embodying the new concept that interspousal maintenance remains as a feature of Canadian family law. What is unexpressed is *why,* and assuming that one married person must maintain the other, *what factual circumstances must exist before one spouse has a legal right to be maintained by the other.*

On a more fundamental level, it is fair to ask what happens to the rest of family law when the basic legal premise of marriage becomes equality before the law. The answer is that the old family law continues to operate, but wherever it does not conform to the concept of equality, it simply becomes arbitrary. As soon as the principle is admitted that maintenance rights and obligations are to be determined by reference to something other than sex, the rationale for every other sexually-discriminatory rule of family law, of which there are many, disappears.

What we are witnessing in Canada today is the piecemeal abandonment of an archaic legal conception of marriage, without yet having arrived at some satisfactory statement of new legal principles telling us what marriage *is*. We believe the solution to this problem lies in the reformulation of the maintenance obligations in marriage according to new and clearly stated principles both at the federal and provincial levels. Indeed, there can be no other solution unless we are prepared to say that we still accept the legitimacy of sexually determined classifications as a fundamental legal characteristic of marriage in Canada, and are willing to continue to tolerate the psychological, social and economic consequences that spill over into society as a result of the institutionalized sexual discrimination that characterizes the primary legal relationship between men and women.

It is obvious that a basic change in the legal philosophy of interspousal maintenance cannot and will not cause the immediate

disappearance of sexually-based discrimination from the social and economic fabric of Canadian society. It is, however, a very important condition to the elimination of such discrimination. The first steps in this direction were taken in the *Divorce Act* in 1968, which provided that entitlement to maintenance would no longer be based upon the sex of the claimant. But this is only half the federal task. The old principles are gone, but nothing was put in their place. Parliament must now examine marriage and articulate whatever it is about this relationship that will give one party, at the time of divorce, a legal claim to financial provision from the other, what facts must be shown for such a claim to arise, what principles govern the amounts that will be awarded, and what circumstances are legally material in determining the length of time for which payment must be provided. By proceeding in this way, Parliament will fill the vacuum left by the *Divorce Act*.

A clear statement of maintenance principles in the *Divorce Act* will not create new difficulties because the philosophy of mutual liability for maintenance is already inconsistent with the concepts of maintenance in most provinces. The *Divorce Act* is inconsistent not only with the maintenance rules of those jurisdictions, but also with the legal concepts of marriage defined by the general body of family law based on those rules. We do not think that Parliament should, or indeed, given the provisions of the *Canadian Bill of Rights,* ought to attempt to reconcile this disparity by going back to a philosophy of eligibility for maintenance on divorce based on sex. Rather, it should proceed to articulate a set of rational and non-arbitrary standards for financial provision under the *Divorce Act* that would be logical extensions of the concept of equality of rights and obligations now inherent in that Act. What is implicit should be made explicit.

Parliament cannot, of course, require the change of laws within provincial jurisdiction; nor, given the nature of a federal state, should it attempt to do so indirectly. In this respect, its responsibility is precisely the same as that of any provincial legislature: to enact the sort of laws within its constitutional jurisdiction that best secure and advance those individual, public and social interests that it identifies as pressing for recognition.

We do not believe the interest in eliminating invidious legal discrimination based on sex from the institution of matrimony is exclusively a federal concern, or that steps taken toward this end by Parliament with respect to that part of family law within its jurisdiction will remain isolated changes for very long. The provision by Parliament of some more precise focus with respect to the nature and concept of interspousal maintenance is essential if the provinces are to be able to get on with the task of law reform in related areas (such as alimony laws and laws dealing with deserted wives) without either the possibility of being subsequently faced with federal laws that are at odds with their reforms, or being left to proceed without knowing Parliament's view on the very foundation of family law in Canada.

As we said in our earlier working paper on family property, the need for intergovernmental cooperation in this field is important and necessary, and we trust that the principle of consultation will be recognized and acted on by the federal and provincial governments involved when these changes are to be made.

CHAPTER 3

New Principles for Financial Provision

The Canadian family law tradition reflects a marital dependency relationship determined according to sex. We agree with the philosophy of the reforms in those provinces that treat both spouses as legal equals regardless of sex, and believe that the time has come for Parliament to make appropriate amendments to the *Divorce Act* so as to pursue the same philosophy on divorce. At present that Act contains no positive principles that effectively support its break with the concept that the sex of an applicant has significant legal implications with respect to maintenance rights and obligations on divorce.

Marriage should be characterized in law as a union of legal equals in which there may be a division of function or a "role specialization", according to the emotional, psychological and financial needs of the spouses and the needs of their children. Financial rights and obligations based upon marriage should be legal results that *follow* from the internal arrangements made by the spouses in line with their priorities, circumstances and interests rather than being *imposed* according to traditional legal preconceptions of the sexually determined roles of each spouse. The purpose of the maintenance obligations on divorce should be to enable a former spouse who has incurred a financial disability as a result of marriage to become self-sufficient again in the shortest possible time. This should be achieved through new rules for financial provision in the *Divorce Act* that would be based on need and that are neither punitive nor fault-oriented.

We do not propose the adoption of any legal arrangement that will interfere with what married people want, that will impose a legal philosophy of marriage that is contrary to arrangements that spouses wish to have in their particular relationship, or that would prevent them from living in accordance with whatever religious precepts or cultural norms they desire to follow. The law should leave married people free to arrange their marriage in whatever way they wish, and should support their choice by legally enforceable financial rights. We believe this concept should become the legal foundation for family law in Canada, and should be adopted by Parliament when it undertakes the task of articulating the principles that govern interspousal maintenance rights and obligations under the *Divorce Act*.

We suggest the following principles:

1. Marriage per se does not create a right to maintenance or an obligation to maintain after divorce; a divorced person is responsible for his or her own maintenance.

2. A right to maintenance may be created by reasonable needs following from:
   (*a*) the division of function in the marriage;
   (*b*) the express or tacit understanding of the spouses that one will maintain the other;
   (*c*) custodial arrangements made with respect to the children of the marriage at the time of divorce;
   (*d*) the physical or mental disability of either spouse that affects his or her ability to maintain himself or herself; or
   (*e*) the inability of a spouse to obtain gainful employment.

3. The purpose of maintenance on divorce is to provide the maintained spouse with financial support required to meet those reasonable needs recognized by law as giving rise to a right to maintenance during the transition period between the end of the marriage and the time when the maintained spouse should reasonably be expected to assume responsibility for his or her own maintenance; maintenance on divorce is primarily rehabilitative in nature.

4. A right to maintenance shall continue for so long as the reasonable needs exist, and no longer; maintenance may be temporary or permanent.

5. A maintained spouse has an obligation to assume responsibility for his or her own maintenance within a reasonable period of time following divorce unless, considering the age of the spouses, the duration of the marriage, the nature of the needs of the maintained spouse and the origins of those needs, it would be unreasonable to require the maintained spouse ever to assume responsibility for his or her own maintenance, and it would not be unreasonable to require the other spouse to continue to bear this responsibility.

6. A right to maintenance is not adversely affected, forfeited or reduced because of conduct during the marriage; or because of conduct after the marriage except
   (*a*) conduct that results in a diminution of reasonable needs; or
   (*b*) conduct that artificially or unreasonably prolongs the needs upon which maintenance is based or that artificially or unreasonably prolongs the period of time during which the person maintained is obliged to prepare himself or herself to assume responsibility for his or her own maintenance.

7. The amount of maintenance should be determined by:
   (*a*) the reasonable needs of the spouse with a right to maintenance;
   (*b*) the reasonable needs of the spouse obliged to pay maintenance;
   (*c*) the property of each spouse after divorce;
   (*d*) the ability to pay of the spouse who is obliged to pay maintenance;
   (*e*) the ability of the spouse with the right to maintenance to contribute to his or her own maintenance; and
   (*f*) the obligations of each spouse towards the children of the marriage.

These principles will now be discussed.

Marriage per se does not create a right to maintenance or an obligation to maintain after divorce; a divorced person is responsible for his or her own maintenance.

Solemnization of marriage does not automatically create a condition of financial dependency. The law of maintenance should take cognizance of this fact and be reformed accordingly. For example, during marriage maintenance rights and obligations could be either reciprocal or separate from the outset, with the law providing in either case for shifting the exclusive or primary responsibility for financial provision to one of the spouses when the circumstances of the marriage create a financial need in the other. Whether this should be done, and the particular formulae that would be adopted are, of course, matters for provincial governments and legislatures. We join with the Royal Commission on the Status of Women in suggesting that changes of this nature be considered by the provinces so as to establish a rational nexus between provincial laws aimed at eliminating sexual discrimination from the legal nature of the marital relationship and the provisions of the federal law invoked to terminate that relationship.

The law of maintenance both during marriage and on divorce should anticipate that partnership arrangements may result in one spouse becoming financially dominant and the other financially dependent and create appropriate and realistic rights and obligations where this occurs. What the law should *not* do is perpetuate or sanction the idea that marriage itself is an arrangement provided by society as an alternative to full participation by women in all levels of the economy, or to retain female dependency rules that furnish a convenient rationalization for denying women an equal opportunity to do so.

The present legal tradition has the negative effect of adopting as valid the proposition that a main function of matrimony is to enable a woman to attain the status that comes with economic achievement by having the status for which she is destined conferred upon her by the man she marries. There follows from this the phenomenon, described by the Royal Commission on the Status of Women, of a "cultural mould" that encourages young women to view marriage itself as their entry into adult society, the primary vehicle for expression of their abilities and the way in which they

should expect to meet their economic needs. Young men, on the other hand, are raised in the expectation that in order for them to marry, or to attract a more desirable marriage partner, they must prepare themselves for a successful career.

The male economic monopoly described by Galbraith can be attributed not only to "the convenience of the producers of goods" but also to the fact that economic success for men is an absolute necessity before they can marry, since they, because they are male, will be required by law to "support a family". The expectations and requirements flowing from the traditional legal characteristics of marriage therefore tend to encourage at an early age a differentiation in life roles based on sex, although it has no rational connection with physical distinctions between men and women, or their abilities, intellectual potential or capacity to contribute to society.

The desire to enter into a permanent social and sexual bond with a member of the opposite sex is a deep-seated need and powerful drive—perhaps the single most important force behind all social organization. Thus impelled, both men and women will do what is required to come within society's definition of "eligible marriage partner". To fail to do so is to risk the ability to marry. Since law both defines marriage, and significantly moulds the community's concept of matrimony, the law should make it clear that people—particularly women—have alternatives in life roles that are free from the influence of arbitrary factors.

The accelerating divorce rate points to the fact that the present law of marriage creates an institution for the satisfaction of the need to establish permanent social and sexual bonds that is increasingly out of step with the expectations that people bring into it. In our view, reform efforts must be directed to the elimination from the law of marriage, and therefore from much of the rest of our social structure, of sexually-based discrimination.

The principle set out above is an essential first step towards the elimination of the use of marriage as an instrument for perpetuating and attempting to justify the arbitrary distribution in society of opportunities, burdens, rights and obligations on the basis of sex.

A right to maintenance may be created by reasonable needs following from:

(*a*) *the division of function in the marriage;*

(*b*) *the express or tacit understanding of the spouses that one will maintain the other;*

(*c*) *custodial arrangements made with respect to the children of the marriage at the time of divorce;*

(*d*) *the physical or mental disability of either spouse that affects his or her ability to maintain himself or herself; or*

(*e*) *the inability of a spouse to obtain gainful employment.*

This principle is aimed at answering the question "if marriage does not create maintenance rights and obligations, then what does?" In general terms, we propose the answer that the right to maintenance follows from arrangements made by married people that have had the effect of hampering the ability of a spouse to provide for himself or herself. If a couple is divorced and neither husband nor wife has had a need created by the circumstances of their cohabitation, then there should be no question of one having a claim to be maintained by the other after a divorce. Except in marriages of short duration or where both spouses have worked continuously and there are no children, this situation will probably prove to be the exception rather than the rule for the foreseeable future. Most people who are now married, and the great majority of the generation who will marry in the next twenty or so years, have or will have marriages in which the functions of wage-earning, housekeeping and child care are divided between the spouses along conventional lines. Whether this should be so is no business of the law.

The law should have two primary objects. First, it should adopt a philosophy of interspousal maintenance that does not tend to compel a sexually-determined mode in which marriage functions are divided, leaving it to the market place of social custom as to how individuals will arrange their marriages in future. Second, it should ensure, as far as it is able, that the economic disadvantages of caring for children rather than working for wages are removed. The pursuit of these objects is limited, from a federal perspective,

to the area of divorce, but what we have said is of great significance to those concerned with the reform of provincial family law as well as to Parliament. We hope that the articulation of what we think should be the objects of the law will be of assistance to provincial legislatures and governments in their study of the social implications and economic consequences of marriage within the ambit of provincial legislative jurisdiction.

The principle we suggest neither attempts the futile task of "turning society around" nor pursues the equally-futile goal of trying to freeze social evolution in the name of an orthodoxy that no longer exists. If some people want to have marriages in which the husband is the breadwinner and the wife is the housekeeper, it should be their affair and not that of the law. Equally, if others find it satisfying for the father to be a full-time parent and the mother to be the source of support for the family, the law should pass no judgment, either express or implied, upon the appropriateness of this arrangement. Rather, the law should give positive support to their choice by granting a right to maintenance to, in this case, the husband, if his reliance upon the maintenance provided by his wife during their marriage has resulted in a need for maintenance for him at the time of divorce.

The way in which the functions characteristic to marriage have been divided, and economic needs that exist at the time of divorce following from what each spouse did during marriage should become the fundamental criteria for maintenance when a marriage ends. A consideration of what actually occurred during the marriage would fill the vacuum left in the divorce law by Parliament's repudiation of the old assumption that, as a matter of law, the wife would always be the housekeeper, the full-time parent and in a condition of economic dependency, and that a husband would always be the wage-earner.

A division of function between marriage partners, where one is a wage-earner and the other remains at home will almost invariably create an economic need in one spouse during marriage. The spouse who stops working in order to care for children and manage a household usually requires financial provision from the other. On divorce, the law should ascertain the extent to which the withdrawal from the labour force by the dependent spouse during

marriage (including loss of skills, seniority, work experience, continuity and so on) has adversely affected that spouse's ability to maintain himself or herself. The need upon which the right to maintenance is based therefore follows from the loss incurred by the maintained spouse in contributing to the marriage partnership.

We should point out that this approach to maintenance necessarily means that as far as the law is concerned, each spouse has an equal responsibility for the three essential functions characteristic of the marriage partnership: financial provision, household management and child care. In the past the law has tended to formally recognize the cultural stereotypes of "breadwinner" and "housekeeper" and turned them into such legal concepts as "the reasonable husband" or "the ordinary ranch wife". The Royal Commission on the Status of Women described these stereotypes in the following terms:

> Regardless of age or circumstances, women are identified automatically with tasks such as looking after their homes, rearing children, caring for others and other related activities. It is almost as if we were to say that it is man's nature to work in an office or factory, simply because most of the men we know in cities happen to do so.

Upon the adoption of positive principles that are contrary to the traditional legal view of sexually dictated marital roles, it would no longer be legally acceptable or conceptually possible for a court to characterize, for example, housework as being an activity that the law *expects* a wife to perform because she is the female spouse. Rather, under the approach we propose, a wife who manages a household would be viewed in law as accomplishing a task that is an obligation *common to the marriage partners*. Looking after the house could no more be legally characterized as "woman's work", and therefore dismissed as being what the law expects of a wife in any event, than could the financial provision coming from the husband in such a marriage be classified in law as a requirement that is exclusively expected of the male sex. If the functions of financial provision, household management and child care are divided in any particular way between a husband and wife, the law should characterize this as an arrangement between the spouses for accomplishing shared requirements of the marriage partnership according to their preferences, cultural beliefs, religious imper-

atives, or similar motivating factors. A spouse who does one of these things should be seen as freeing the other spouse to perform the remaining functions.

If a financial need exists for one spouse at the time of divorce, and this need has been created by or has resulted from the way in which functions were shared between husband and wife, then the needy spouse would have a claim to maintenance that the law should recognize and enforce. This claim would be based on the facts of the spouses' experience during the marriage and not on the sex of the claimant. It should not and could not be defeated or adversely affected by assimilation into law of sexual stereotypes that assume that husbands have no responsibilities towards child care or household management or that wives have no responsibilities for financial provision. In legal terms, *de facto* arrangements will give rise to *de jure* obligations.

The whole preceding discussion can, we think, be summed up in the concept of *equality before the law*. This has long been a professed ideal of this country. We think it is time to apply it to family law.

We propose that a right to maintenance may arise from "the express or tacit understanding of the spouses that one will maintain the other" so long as such an arrangement, made either before or during marriage, results in a reasonable need for financial provision for the maintained spouse at the time of divorce. In almost all cases, the division of function in the marriage will itself account for the need upon which a maintenance claim is based, and no question of any special understanding, express or tacit, will arise. It is not uncommon, however, for people to marry with the understanding, for example, that each will help the other, in succession, through university or professional training. To illustrate, a wife who works to put her husband through university on the understanding that he will thereafter do the same for her, could probably not be said to have a need for maintenance arising out of the division of function in the marriage. But she may very well have a need for financial assistance with her own university training that is reasonable in light of her expectation that her spouse would provide such assistance, even though the marriage breaks down before the arrangement intended by the parties is complete.

Another example might be where a well-to-do man married and provided his wife with everything, including a housekeeper, while she did little or nothing. Such a woman would have to learn how to do things for herself at the time of a marriage breakdown, and would therefore have reasonable needs arising out of the arrangement that existed during her marriage. These needs should be respected by the law, regardless of her gratuitous enjoyment of what may appear to some as a rather idyllic married life. The range of possible situations is as broad as the range of understandings that may arise between married people with respect to how they should cooperate to ensure that the interests and needs of each are satisfied.

In speaking of a "tacit understanding" we are not suggesting that it should be necessary, as a prerequisite to a maintenance claim, that formalities associated with a contract be established. The law should simply determine the arrangement that actually existed, or that can reasonably be taken to have existed, based upon the circumstances and behaviour of the spouses during the marriage. As we have emphasized, this determination would be made without the distorting incorporation into law of traditional legal preconceptions about sexual roles in marriage.

We do not see this principle as being one of unlimited application. A need that is reasonable in light of arrangements based on a mutual expectation that the marriage will continue may appear to become unreasonable if the marriage later breaks down. It is conceivable, for example, that a woman might willingly contemplate marrying a student who plans eventually to be a novelist, whom she would support through his studies and thereafter until (if ever) he becomes successful, simply because she loves him. The continued existence of the marriage, however, would certainly be the assumption upon which this, and most other tacit understandings to maintain, would be based. The man in this example would be entitled to transitional assistance after divorce, as would be true for a woman in similar circumstances, but not to the pursuit for an indefinite time of his unrewarding career preference at the expense of his former spouse. We suggest that any legislation containing a tacit understanding principle should be drafted with this in mind.

Custodial arrangements to children at the time of divorce should also be recognized as situations that may create needs upon which claims for maintenance can be based. Whether a need does arise in a custodial parent is a question of fact, not of law, and would turn on such matters as the age and number of children involved, whether they need constant care or are partially or wholly emancipated, whether suitable alternatives to care by the custodial parent (such as public day-care facilities) are reasonably available and whether their use would be in the best interests of the child and the effect that custody has on the ability of the custodial parent to provide for his or her own maintenance. We are speaking here only of the needs of the custodial spouse and not of financial provision for children. We will deal with this as a separate subject in another working paper.

The physical or mental disability of a spouse is another matter that should be a ground for maintenance at the time of divorce. Although we do not support the idea that marriage *per se* should involve the right or duty of maintenance after divorce, we do suggest that the physical or mental disability of a spouse at the time of divorce is a reasonable criterion upon which to found an obligation to maintain. Again, however, we do not see this as a principle of unlimited application. We believe the primary responsibility for the provision of care of persons with a permanent or long-term disability rests with the state and not with any afflicted person's spouse or former spouse. We also think it possible, in any particular case, for a court to strike a balance between the time during which the fact of marriage should create a maintenance obligation because of misfortune, and the time when the state should assume the burden. We will pursue this point below, when we discuss the duration of the maintenance obligation.

The inability of a spouse to obtain gainful employment at the time of divorce is conceptually similar to the inability of a physically or mentally disabled spouse to provide for himself or herself. The inability may have no logical connection to the fact that the person claiming maintenance was married to the person upon whom the claim is made, and performed a certain role within the marriage partnership. We believe, however, that during marriage it would be reasonable for the law to expect that the first

resort for financial provision by an unemployed married person would be to his or her spouse, if capable, rather than to public assistance (excluding assistance for which the unemployed spouse has paid, such as unemployment insurance). An obligation based on these grounds should, like an obligation founded on physical or mental disability, survive the dissolution of the partnership for a reasonable time. We will return to this matter where we consider the question of duration of maintenance obligations.

The purpose of maintenance on divorce is to provide the maintained spouse with financial support required to meet those reasonable needs recognized by law as giving rise to a right to maintenance during the transition period between the end of the marriage and the time when the maintained spouse should reasonably be expected to assume responsibility for his or her own maintenance; maintenance on divorce is primarily rehabilitative in nature.

A right to maintenance shall continue for so long as the reasonable needs exist, and no longer; maintenance may be temporary or permanent.

A maintained spouse has an obligation to assume responsibility for his or her own maintenance within a reasonable period following divorce unless, considering the age of the spouses, the duration of the marriage, the nature of the needs of the maintained spouse and the origins of those needs, it would be unreasonable to require the maintained spouse ever to assume responsibility for his or her own maintenance, and it would not be unreasonable to require the other spouse to continue to bear this responsibility.

These three principles should be considered together. Maintenance is an aspect of the marriage partnership. When the marriage is terminated important issues arise as to whether this incident of the marriage should continue past the time of its dissolution, and if so, for how long.

In accordance with the general scheme we have set out earlier in this chapter, maintenance rights and obligations on divorce

should arise out of the arrangements that existed during the marriage. We have already discussed the basis for our proposal that the dissolution of the marriage should not mean the automatic termination of those rights and obligations, since the needs upon which they are based may continue past the time of divorce. We deal now with the issue of the principles that should determine the length of time for which one former partner should have the benefit of, and the other former partner should bear the burden of this aspect of a marriage that has ceased to be.

In general terms, we suggest that maintenance rights and obligations, where they exist, should survive a divorce for a reasonable period of time and should be subject to the basic principle that every person is ultimately responsible to provide for himself or herself, whether before marriage or after divorce. What is a "reasonable period of time" would be a question of fact in each case.

It must be recognized that this is a departure from the traditional concept of maintenance on divorce, which was founded on the theory that paid employment was basically an activity reserved for men. The economic needs of women were expected to be taken care of by marriage, and upon marriage a woman could anticipate being furnished with the necessaries of life for so long as she lived. These assumptions lead to unfair consequences in the area of equal opportunities for both sexes in the job market and in Canadian society in general. These three principles under discussion simply reiterate our basic philosophy that the law must withdraw its support from the proposition that marriage *per se* is the primary vehicle provided by society for enabling women to meet their economic needs. The principles we propose will deprive no person of either sex of financial provision where a need for it was created by marriage. But they will have the effect of removing the legal foundation for the idea that marriage is the financial preserve for women, while the job market belongs to men. The motives held out for women to marry, and the male interest in continuing to seek or assert preferred positions in the economy that are created by traditional legal concepts of marital economics are, we believe, unacceptable today. Economic need should no more be an inducement to marry than should sex be a criterion governing participation in the labour force.

We suggest that the period following divorce should be characterized in law as a time of economic transition for both spouses from the arrangements that were suitable to the marriage when one spouse may have made financial provision for both, to the single state when each should be, as before marriage, financially self-reliant. The law should require the former spouse who does not have an economic need created by the marriage to assist the one who has such a need to become financially rehabilitated.

The legal right to continue to benefit from the maintenance aspect of the partnership after its dissolution should be accompanied by a legal duty imposed on the person maintained to prepare to make his or her own way within a reasonable period of time, just as is required of every other unmarried person. Here again, what is a reasonable period of time is a question of fact, not law. It may vary from weeks to years, depending upon a consideration of all elements of the situation with which the person maintained must cope, and would be subject to an assessment of the length of time during which financial needs flowing from the marriage can be expected to persist, assuming reasonable diligence in the effort to become financially self-sufficient.

The third principle set out at the opening of this discussion reflects the realization that, for some people, even with reasonable diligence, financial independence may never be possible. Perhaps the most typical example might be a divorced woman in her sixties without any special training or skills who had been a dependent during a long married life. Without knowing anything more about such a woman, we think it will be conceded that she could fairly be classed as unemployable, without much hope that she could do anything to change the situation. In addition to practical problems and physical limitations that would not be faced by a younger person, such a woman may be partially or totally unable pyschologically ever to assume financial responsibility for herself. The third principle would allow a court to assess these factors and to order, where appropriate, permanent maintenance.

Another aspect of the third principle is that, while a former spouse may require maintenance on a permanent basis, it would be unreasonable for the law to look to the other former spouse as the permanent source of such maintenance. This would apply primar-

ily in the case of long-term physical or mental disability. We think it would be wrong for the fact of marriage to be seen as an alternative to the responsbility of the state to provide adequate care for the disabled. A temporary disability that exists at the time of divorce may well call for financial support from the other spouse based on a rehabilitative theory. But permanent provision for the victims of misfortune should be borne by general tax revenues and not by a former spouse.

We would apply the same principle to a person whose need does not flow from the division of function in the marriage, but who is unemployed at the time of divorce. It would be legitimate, we think, to expect the unemployed person's former spouse to provide financial assistance during a period of adjustment after divorce. But on the expiration of a reasonable time, the inability to find gainful employment must cease to be a problem that is shared as if the marriage had never ended. The financial need may still exist, but at some point it would be unreasonable for the law to continue to look to a former spouse as the source for satisfying that need.

A right to maintenance is not adversely affected, forfeited or reduced because of conduct during the marriage; or because of conduct after the marriage except

(*a*) *conduct that results in a diminution of reasonable needs, or*

(*b*) *conduct that artificially or unreasonably prolongs the needs upon which maintenance is based or that artificially or unreasonably prolongs the period of time during which the person maintained is obliged to prepare himself or herself to assume responsibility for his or her own maintenance.*

Under traditional theory, in the words of the Ontario Law Reform Commission, "In exchange for her unilateral privilege to be supported it was expected, in an age when a married woman was, essentially, a chattel, that she should be able to enjoy this privilege only upon surrender of exclusive rights in her person and personality." In other words, a married woman was entitled to be

furnished with the necessaries of life by her husband providing that she had sexual relations with no other person. The Ontario Law Reform Commission concluded that there is no coherent reason why "these should continue to be viewed as appropriate commodities for a woman to be expected to bargain in return for support, any more than there is such a reason for a man to be expected to carry the exclusive burden of her maintenance".

We concur with these views, and the principle set out above, when read with the rest of the principles we propose for maintenance on divorce, represents what must be done in order to make it clear that the law no longer sanctions the coercive use of financial power by the economically stronger spouse over the behaviour of the economically weaker spouse.

In our view, sexual fidelity is an intrinsic part of a happy and successful marriage, and is a reasonable expectation for each spouse to have of the other. But this expectation of propriety in sexual conduct should have nothing to do with maintenance obligations. These flow, under our proposals, from needs created by the way in which the spouses have arranged their lives for their mutual benefit, and such needs are not affected by the morality, or lack of morality, of one or both spouses. Financial provision in marriage should not be characterized as a reward for "good" behaviour, and the threat of loss of financial provision as a penalty for "bad" behaviour; punitive maintenance orders made against a "guilty" spouse in favour of an "innocent" spouse are things that simply do not fit into the maintenance equation.

We have already stated that it would be wrong for the law to continue to sanction the view that economic need is a primary inducement to marry. By the same token, it should not countenance the situation under which the economic need of the dependent spouse (or put another way, the threat of financial loss for being legally "guilty" of ending a marriage) should be a primary inducement to stay married.

Maintenance rules should not allow one spouse to have a coercive power over the other. It is an unfortunate part of the folklore of marriage, because of the legal tradition involved here, that the "innocent" husband should be able to put the "guilty" wife "out on the street without a penny", and when the situation is reversed,

the wife should be able to "take him for every cent he's got". The law can do very little about the desire to inflict financial punishment upon a spouse who has betrayed the trust that marriage entails. But it can and should make it clear that provisions for economic readjustment after divorce shall not be used as implements for translating this desire into legally-enforceable vengeance.

What we have said about sexual misconduct applies equally to all other forms of behaviour that may have led to a divorce. It is simplistic to believe that the causes of marriage breakdown can be neatly polarized into categories of "guilt" and "innocence", or that the law of divorce has been anything other than a failure in its attempts to do so. To allow financial rights and obligations on divorce to follow from a determination so fraught with uncertainty would do no more than compound the human suffering that results from a law that is so fundamentally deficient in the first place.

In the words of Nietzsche, "the commonest stupidity consists in forgetting what one is trying to do". The purpose of the maintenance obligation should be the economic rehabilitation of a dependent spouse and not the provision of reparations for real or fancied injuries that occurred during the marriage. Maintenance rights and obligations based on need would provide a foundation for marriage as a relationship between legal equals. Maintenance rights and obligations that turn on behaviour would merely perpetuate marriage as a legally-sanctioned subordination of the personality of one spouse to the economic power of the other.

Conduct is relevant to maintenance only when it affects need. If, for example, a maintained former spouse takes a job or becomes dependent on a third person, the obligation to maintain should be diminished or terminated accordingly. Similarly, if a need is based on lost skills, a maintained former spouse should have a positive obligation to try to recover those skills within a reasonable time. Lack of diligence in the discharge of this obligation would be conduct affecting the right to support by a former spouse.

This principle is not foreign to the Canadian legal system. Under the law of contract, a party who breaks a contract incurs

an obligation to pay money to the other if loss occurs. But a person who suffers damage from the breach has an equivalent obligation to take all reasonable steps to keep his loss (and consequently the amount the other party must pay) to a minimum. The law of contract is not used to vindicate outraged feelings; it concentrates on making people act reasonably rather than being punitive or moralistic. We think maintenance on divorce should be based on similar principles. If it is reasonable to impose a post-divorce maintenance obligation for the rehabilitation of the economically weaker spouse, it is equally reasonable to impose a post-divorce obligation on the latter to do what he or she can to become self-sufficient.

Since 1968, the *Divorce Act* has provided that "conduct" should be considered with respect to maintenance awards, but it does not say what effect conduct should have on eligibility for, on liability to provide, or amount of, maintenance. We believe it is necessary for Parliament to make some positive rule on this subject since the matter now rests uneasily between the old tradition of the punitive use of maintenance orders and the present lack of any specific policy. The issue must be faced squarely, and we suggest it should be resolved in the way we have outlined here.

The amount of maintenance should be determined by:

(*a*) *the reasonable needs of the spouse with a right to maintenance;*

(*b*) *the reasonable needs of the spouse obliged to pay maintenance;*

(*c*) *the property of each spouse after divorce;*

(*d*) *the ability to pay of the spouse who is obliged to pay maintenance;*

(*e*) *the ability of the spouse with the right to maintenance to contribute to his or her own maintenance; and*

(*f*) *the obligations of each spouse towards the children of the marriage.*

A key concept in the above principle is that of "reasonable needs". This represents a shift in emphasis away from the traditional theory for determining the amount of maintenance. That theory can best be summed up by the expression that a divorced man who was liable to pay maintenance had to support his former wife according to "the style in which she was accustomed to be kept". We believe this test is objectionable on several grounds, and that it is inconsistent with the philosophy of the principles of maintenance we have proposed.

First, we reiterate that the financial expectations created by the divorce law should not, even inferentially, allow marriage to be seen as a substitute for individual achievement or as an alternative to seeking training and education for the station in life to which an individual aspires. By the same token, the legal aspects of marriage should no longer give support to the practice of withholding educational and employment opportunities from women on the ground that they are expected to be dependents, are guaranteed the life style that accompanies economic success in any event by marrying and that it is therefore acceptable for educational institutions and the job market to give priority to men.

Second, divorce in the great majority of cases will create greater economic burdens than existed during the marital relationship. It is simply not possible for the life style of the former spouses to remain unaffected. Under the old tradition of maintenance, the law again resorted to a conduct test in an attempt to solve this problem by saying the loss of life style was a penalty for matrimonial fault that fell on the "guilty" spouse. If a wife was "guilty" and a husband "innocent", she was not eligible for maintenance on divorce. If she was eligible, it meant that she was "innocent" and he was "guilty" and it would therefore be unfair for her to be deprived of the financial benefit of the arrangement society had for the provision of a livelihood for women—that is, marriage—because of her husband's fault. As the "innocent" spouse, her right to be maintained according to the style established during the marriage remained unaffected.

As we discuss at greater length in our Working Paper on Divorce, we have concluded that it is not possible for the law to

examine the wreckage of a marriage to determine whose "fault" caused its breakdown, or to make behavioural assessments that have anything to do with what actually occurred between or motivated the parties. This being so, the legal concept of "no loss to the 'innocent' spouse" should be formally repudiated as a standard upon which to base the legally-prescribed economic consequences of divorce. If "guilt" and "innocence" are disregarded in matters of eligibility for maintenance as we have suggested, it follows that they should have no effect upon the amount of maintenance. The question then becomes whether the loss in standard of living that follows divorce should fall exclusively on the spouse who made financial provision during the marriage and never on the dependent spouse, or whether the law should attempt some more rational allocation of the loss between the two. The principle we propose for determining the amount of maintenance attempts to apportion the economic burdens of divorce according to the "reasonable needs" of *each* spouse, rather than on notions of "guilt" or "innocence", and avoids the idea that aspiring to dependency in the marital relationship would be a guarantee that all economic risk would be borne by the other spouse should the marriage be unsuccessful.

The essence of the change we propose lies in the shift in legal emphasis towards a philosophy of individual responsibility. The significant legal effect of marriage under such a philosophy would be to create a right to rehabilitory financial assistance in the event that the circumstances during marriage impaired the ability of a spouse to assume that responsibility after divorce. Ensuring financial re-establishment for the needy spouse rather than attempting to perpetuate the life style of the defunct marriage for the "innocent" spouse would, we believe, be a reasonable and realistic basis for courts to employ in determining both the eligibility for and the amount of maintenance.

The standard of living enjoyed by the spouses during marriage would not cease to be an operative factor on divorce, and should be taken into account to the extent that it is *relevant* to the reasonable needs of each spouse. "Reasonable needs" will vary from individual to individual according to the marital and life experience of every person.

The standard of living would be the governing, as opposed to a merely relevant factor, only in property sharing on divorce. As we stated in our earlier working paper on family property law, the spouses should share in assets acquired during marriage equally. How well the married couple had fared would tend to be reflected in the value of the assets available for sharing on divorce. The concomitant principle we now propose is that on divorce, when the fruits of the joint life style are shared, that life style, no less than the union that brought it into being, should cease to exist in law.

The amount of property owned by each spouse should be a relevant factor in arriving at the amount of maintenance payable on divorce. All property owned by the spouses, not just the property classified as shareable on divorce, should be considered. Generally speaking, the more property a spouse owned the less would be that spouse's need.

In a typical case, assuming the enactment of property sharing laws, a person with a right to maintenance would have half the shareable property and a lower capacity to earn income, while the other spouse would have the remaining half of the property and a relatively higher income-producing capacity. We do not think it would be just to expect a spouse with a need for maintenance to be required to resort exclusively to his or her property after divorce in order to meet his or her requirements. On the other hand, we do not think that property should be disregarded. Under the formula in the principle under discussion, a court would allocate the burden of maintenance among four potential sources: the property and earning capacity of the husband and the property and earning capacity of the wife. How this distribution would be made would depend on the situation. The point we wish to make is that property should neither be exempt from consideration when the amount of maintenance is determined, nor should a spouse with a claim to maintenance always be expected to meet maintenance needs out of his or her property before a court would be able to make a maintenance order that would encroach on the property or future earnings of the other spouse. The burden should be allocated equitably in light of the circumstances.

The obligations of each spouse toward children of the marriage should, of course, always be considered in assessing the amount of maintenance. We consider this point to be self-explanatory.

CHAPTER 4

Conclusions

At present, the *Divorce Act* does not define precise criteria for maintenance awards. This being so, the courts have found themselves between a novel legislative concept of unknown dimensions on one hand and on the other, a legal tradition of precedent, doctrine and practice that reflects sexually-discriminatory social and economic policy preferences that stretch back to the origins of the common law.

Legislation along the lines we propose would do several important things. First, it would make it clear that the courts have been freed from the burden of an archaic tradition, arbitrary in conception and demeaning in effect, that should have no further influence on something as significant as interspousal maintenance obligations in contemporary Canadian society. Second, it would provide a rational basis for the unfettered development of a jurisprudence of interspousal equality before the law. Third, it would provide for the first time a clear statement of principles respecting an important aspect of the legal nature of marriage in Canada, the present lack of which is an impediment to provincial reform efforts with respect to the great body of laws within their jurisdiction that deal with family relations.

Much of what we have proposed in this working paper is not far removed from the present practice of the courts, although in the absence of a coherent legislative policy, the jurisprudence is often uneven and lacking in focus. Parliament has an obligation to clearly articulate the direction in which the law should move in

every case, within a conceptual framework that is consistent with known, uniform and fair principles.

Oliver Wendell Holmes once wrote "a body of law is more rational and more civilized when every rule it contains is referred articulately and definitely to an end which it subserves, and when the grounds for desiring that end are stated or are ready to be stated in words." By this test, the *Divorce Act* maintenance provisions are clearly deficient. One spouse—either a husband or a wife—may be ordered to pay maintenance to the other at the time of divorce. There is no indication in the *Divorce Act* as to why this should happen, what the nature of the obligation is, what a spouse must show in order to present a maintenance claim, the criteria determining the duration for which maintenance should be payable, the relationship between conduct and the eligibility for maintenance, whether maintenance is a pension or a form of rehabilitory assistance, or how much maintenance should be paid. In this working paper we have attempted to answer these questions and to state the ends and the underlying purposes of interspousal maintenance on divorce.

We believe that these questions are far too significant to far too many people for Parliament to continue to remain silent. Nor should the courts be expected to restructure these fundamental tenets of family law where Parliament has not done so. The importance of legislative reform to the strength of the family and the future vitality of the institution of matrimony—and therefore to the Canadian society itself—is manifest.

The specific reforms we propose in this working paper deal only with maintenance principles that are amenable to federal action. Concepts of legal equality on divorce, however, should be only a pale reflection of a reality of equal treatment before the law that is born with a marriage under provincial and territorial laws and which characterizes every aspect of all legal relationships between husband and wife. Given the constitutional division of legislative authority over matters that affect many significant features of marriage, Parliament, in the areas discussed in this working paper, can really only accomplish part of the task. The removal of obstacles to the development of a new Canadian ethos of socio-legal equality for all married persons requires coordinated affirmative action by all governments and legislatures in Canada.

Law Reform Commission of Canada
Commission de réforme du droit du Canada

maintenance on divorce

Working Paper 12